

**EMPLOYER STATUS DETERMINATION  
DURANGO AND SILVERTON NARROW GAUGE RAILWAY**

This is the decision of the Railroad Retirement Board regarding the continued status of the Durango and Silverton Narrow Gauge Railway (D&SNG) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

The D&SNG owns and operates a 45 mile line of narrow gauge railroad between Durango and Silverton, in Colorado. It was held to be an employer under the Acts in 1981 (Legal Opinion L-81-106) because the Interstate Commerce Commission had held it subject to ICC jurisdiction as a common carrier in interstate commerce (since it was possible that interstate commerce could move on the line). In 1988 the ICC determined that it did not have jurisdiction and the D&SNG requested the RRB to terminate its coverage. However, in 1989 the ICC reversed the 1988 decision and the D&SNG was informally notified by the Board that in view of the 1989 ICC decision which held that the railroad continues to operate in interstate commerce and that the ICC continues to have jurisdiction, no response to the request for a formal ruling was required.

In 1993 the ICC reversed the 1989 decision, reinstating the 1988 decision that the ICC did not have jurisdiction over the D&SNG, and the D&SNG has requested that the Board terminate its coverage under the Acts as of December 31, 1989. The tariffs under which interstate commerce could have been shipped over the line were cancelled by that time, and no freight has been shipped or passengers have travelled in interstate commerce since that date. All shipments of freight have originated and terminated locally.

The definition of an employer contained in section 1(a) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) reads in part as follows:

The term "employer" shall include--

(i) any express company, sleeping car company, and carrier by railroad, subject to [the Interstate Commerce Act];

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of

passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad \* \* \*. [Emphasis supplied.]

-2-

Section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a)) provides a substantially identical definition.

Section 10501 of the Interstate Commerce Act sets forth the general jurisdiction of the ICC over transportation by rail. Section 10501(b) provides in pertinent part that:

(b) The Commission does not have jurisdiction under subsection (a) of this section over-

(1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle. (49 U.S.C. § 10501(b)(1)).

Since passengers and freight are transported solely within one state, under section 10501(b)(1), above, D&SNG would not be subject to ICC jurisdiction and would therefore also not fall within the definition of "employer" set out in section 1(a)(1)(i) of the Railroad Retirement Act. The evidence adduced is that D&SNG is not owned or controlled by, or under common control with, one or more employers as required by paragraph (ii) of section 1(a) of the Railroad Retirement Act. Accordingly, it would not be an employer under section 1(a)(1)(ii) of the Act.

Consistent with the above, it is determined that D&SNG ceased to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective with the close of business on December 31, 1989.

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Glen L. Bower

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V. M. Speakman, Jr.

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Jerome F. Kever

MCLitt:atr  
689-94  
Durango.cov

Mr. Edward T. Lyons, Jr.  
Jones & Keller  
1625 Broadway  
Suite 1600  
Denver, Colorado 80202

Dear Mr. Lyons:

This is to acknowledge receipt of your letter of March 24, 1994, on behalf of the Durango and Silverton Narrow Gauge Railroad Company, enclosing a petition for termination of coverage under the Railroad Retirement and Railroad Unemployment Insurance Acts, and to advise you that that petition is now under consideration by the Board.

Sincerely,

FOR THE BOARD  
Beatrice Ezerski  
Secretary to the Board

MCLitt:cmw  
689-94  
DURANGO.COV

**TO:** Chief Financial Officer

**FROM:** General Counsel

**SUBJECT:** Employer Status  
Durango and Silverton Narrow Gauge Railway

This is in response to your submission regarding the employer status of the Durango and Silverton Narrow Gauge Railway.

In order to determine the employer status of that company it is necessary to determine whether it may be under common control with a rail affiliate. Therefore would you please obtain information as to the ownership of that company and also as to whether it owns any other companies and submit it to this office.

Catherine C. Cook

MCL:mcl

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24 May 1994

Steve, Tom -

In case the reference to common ownership in the draft is insufficient, I have included a draft memo referring the case to BFO to get information regarding the ownership of & by Durango.

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